

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARL SMITH,

Petitioner,

v.

THERESA DELBALSO,
THE ATTORNEY GENERAL OF THE
STATE OF _____, and
DISTRICT ATTORNEY OF
PHILADELPIHA COUNTY,
Respondents.

CIVIL ACTION

NO. 19-3066

ORDER

AND NOW, this 2nd day of September, 2020, upon consideration of Petition Under 28 U.S.C. § 2254, filed by *pro se* petitioner, Carl Smith, and the related submissions of the parties, the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski dated March 4, 2020, and Petitioner's Objections of Magistrate's Report and Recommendation, **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski dated March 4, 2020, is **APPROVED** and **ADOPTED**;
2. Petition Under 28 U.S.C. § 2254, filed by *pro se* petitioner, Carl Smith, is **DISMISSED** and **DENIED**;
3. Petitioner's Objections of Magistrate's Report and Recommendation are **OVERRULED**.

IT IS FURTHER ORDERED that a certificate of appealability will not issue because reasonable jurists would not debate (a) this Court's decision that the petition does not state a valid claim of the denial of a constitutional right, or (b) the propriety of this Court's procedural

rulings with respect to petitioner's claims. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The decision of the Court is based on the following:

1. The facts of the case are detailed in the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski, dated March 4, 2020, which the Court has approved and adopted. The Court writes at this time only to explain its rulings on *pro se* petitioner's Objections to the Report and Recommendation.

Pro se petitioner raises two categories of objections: he disagrees with the main conclusion of the Report and Recommendation that his claims are procedurally defaulted and he objects to the rejection of his remaining claims. The Objections merely summarize and restate the arguments raised in the *habeas* petition which were rejected by the Magistrate Judge in her Report and Recommendation. The Court is in complete agreement with the Report and Recommendation;

2. In *pro se* petitioner's First Objection he argues that the procedural default on Grounds 4, 5 and 6 should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012). As explained in the Report and Recommendation, *Martinez* only applies to underlying procedural defaulted claims of trial counsel's ineffectiveness that are "substantial" or have "some merit." *Pro se* petitioner's Grounds 4 and 5 assert a due process violation and prosecutorial misconduct, not claims of ineffective assistance of counsel. *Martinez* is inapplicable to those claims because they do not involve ineffectiveness of counsel. As to Ground 6, in which *pro se* petitioner raised an issue of trial counsel's ineffectiveness, the Magistrate Judge correctly concluded that the claim was not "substantial." *Pro se* petitioner argued that his attorney failed to present an argument at trial that his counsel did, in fact, present;

3. This Court agrees with what is stated in the Report and Recommendation with respect to Grounds 4, 5 and 6. They must be denied as procedurally defaulted because they were not presented to state courts and no exceptions apply. The Objection with respect to Grounds 4, 5 and 6 is therefore overruled; and

4. In the Second Objection *pro se* petitioner objects to the Magistrate Judge's conclusion that Ground 1, 2, 3A and 3B were reasonably rejected. He provides no new evidence or arguments and merely repeats what was stated in his *habeas* petition – that the Pennsylvania courts unreasonably denied his claims. The Magistrate Judge rejected these claims in her Report and Recommendation. The Objection with respect to Grounds 1, 2, 3A and 3B is overruled for the reasons stated in the Report and Recommendation.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.